

**IN UNITED STATES DISTRICT COURT
FOR DISTRICT OF PUERTO RICO**

SAMUEL HILDENBRAND, on behalf of
himself and all others similarly situated,

plaintiff,

vs.

W HOLDING COMPANY, INC., *et al.*,

defendants.

CASE NO. 3:07-cv-01886- JAG

SECURITIES CLASS ACTION

**RULE 12(B)(6) MOTION TO DISMISS JOSE M. BIAGGI'S AMENDED
CROSS-CLAIM AND JOINDER OF DEFENDANTS FRANK STIPES,
FREDDY MALDONADO, NORBERTO RIVERA AND RICARDO
HERNANDEZ IN THE RULE 12(B)(6) MOTION TO DISMISS AMENDED
CROSS-CLAIM OF JOSE M. BIAGGI OF DEFENDANTS
W HOLDING COMPANY, INC., AND WESTERNBANK PUERTO RICO**

Defendants Frank C. Stipes, Freddy Maldonado, Norberto Rivera and Ricardo Hernandez (collectively, the "Officers"), pursuant to Federal Rule of Civil Procedure ("Rule") 8(a), 12(b)(6) and 13(g), the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), as amended, and 28 U.S.C. § 1658(b) (2009), move this Court for an order dismissing the amended cross-claim filed by defendant Jose M. Biaggi, Docket No. 140 ("Amended Cross-Claim") with prejudice.

Summary of Argument

The Officers join in, adopt as their own and incorporate in this motion the arguments and authorities set forth in the Rule 12(b)(6) Motion to Dismiss Amended Cross-Claim of Jose M. Biaggi submitted by defendants W Holding Company, Inc., ("W Holding") and Westernbank Puerto Rico ("Westernbank") (Docket No. 143).

In addition, to the extent that Biaggi now attempts to assert a claim for securities fraud directly against the Officers, any such claim is time-barred under § 1658(b), and should be dismissed.

Argument

Biaggi has amended his cross-claim to now “claim[] and request[] that all natural persons who are named Defendants in the Complaint be *[sic]* held jointly and severally liable to Biaggi for all economic losses which Biaggi has suffered and may suffer in respect of the securities of W Holding which Biaggi purchased *[sic]* during the Class Period” because they “did not properly report the affairs of the Business Credit Division in the SEC filings . . .” *See* Amended Cross-Claim ¶ 2, 3.

Biaggi’s Amended Cross-Claim against the Officers fails not only on the grounds set forth by W Holding and Westernbank in their motion to dismiss the Amended Cross-Claim, Docket No. 143, but also because, to the extent Biaggi has asserted any cross-claims, those claims are time-barred.

Under § 1658(b), a “private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of 2 years after the discovery of the facts constituting the violation . . .” Here, Biaggi learned of the facts that he alleges give rise to his claims of damages against the Officers on or before June 26, 2007, when W Holding’s Form 8-K was filed disclosing the impairment of the Inyx loan.¹ Biaggi’s first cross-claim was filed on October 29, 2009, and did not relate back to the complaint. *See United States for the Use of Bros.*

¹ Biaggi admitted knowledge of W Holding’s Form 8-K as of June 26, 2007, when he “incorporate[d] by reference all the allegations . . . of the Complaint . . .” Amended Cross-Claim ¶1. A copy of W Holding’s Form 8-K filed on June 26, 2007, is attached as Exhibit A.

Builders Supply Co. v. Old World Artisans, Inc., 702 F. Supp. 1561, 1569 (N.D. Ga. 1988) which holds:

In determining whether a cross-claim may relate back to the date of the original complaint, the federal courts distinguish between those wherein the defendant seeks to reduce the amount a plaintiff can recover, such as by recoupment, contribution, or indemnity, and those wherein the defendant is seeking affirmative relief (internal quotations omitted). Where the claim of the defendants is an affirmative independent cause of action not in the nature of a defensive claim, the defendant must comply with the applicable statute of limitations.

See also Appelbaum v. Ceres Land Co., 687 F.2d 261, 263 (8th Cir. 1982); *Kansa Reinsurance Co., v. Congressional Mortgage Corp., et al.*, 20 F.3d 1362, 1366-8 (5th Cir. 1994). Here, Biaggi's claim for economic loss against the officers purports to be independent from the claims asserted by plaintiffs in the Complaint.

Because more than two years elapsed between Biaggi's discovery of the facts allegedly giving rise to his claims, and Biaggi's cross-claim, Biaggi's claims for economic loss in the Amended Cross-Claim are statutorily barred under 28 U.S.C. § 1658(b).

WHEREFORE, the Officers respectfully request that the Court enter an order dismissing Biaggi's Amended Cross-Claim with prejudice.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of January, 2010.

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CERTIFICATE OF SERVICE

I CERTIFY that on January 13, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

s/M. Paula Aguila

M. Paula Aguila

SERVICE LIST

Hildebrand v. W Holding Company, Inc., et al.
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